Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of **Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services**	)))))))	**CC Docket No. 01-337**

REPLY COMMENTS OF THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES

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The Association of Communications Enterprises ("ASCENT"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R.§ 1.415, hereby responds to the comments of BellSouth Corporation ("BellSouth"), Qwest Communications International Inc. ("Qwest"), SBC Communications Inc. ("SBC"), and the Verizon Communications Inc. and affiliated local telephone companies ("Verizon") (collectively, the "Large Incumbent LEC Commenters") addressing the *Notice of Proposed Rulemaking*, FCC 01-360, released December 20, 2001, in the captioned proceeding ("*NPRM*"). In the *NPRM*, the Commission sought comment on "what regulatory safeguards and carrier obligations, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband service."[1] The Large Incumbent LEC Commenters argue that incumbent local exchange carriers ("LECs") should be effectively relieved of all regulatory oversight in their provision of

1 NPRM, FCC 01-360 at ¶ 1.

broadband services. They, however, fail to make a *prima facie*, much less a persuasive, case for such dramatic relief.

The Large Incumbent LEC Commenters' stance is undermined by a number of fatal flaws in their arguments and presentations. First, the Large Incumbent LEC Commenters overstate the extent of competition in the broadband market, most significantly with respect to the small business sector, but also with respect to both the residential and large business sectors. Second, the Large Incumbent LEC Commenters wrongfully seek to divorce determination of the appropriate regulatory constraints to be imposed on their provision of broadband services from their continued dominance in the local exchange/exchange access market. Third, the Large Incumbent LEC Commenters erroneously assume that limited broadband competition will satisfy the Congressional objective of fostering a dynamic, fully competitive telecommunications market. Fourth the Large Incumbent LEC Commenters fail to substantiate their claim that dominant carrier regulation of their provision of broadband services has dampened deployment of broadband capability. ASCENT will address each of these false arguments in the pages that follow.

1. The Large Incumbent LEC Commenters Seriously Overstate the Extent of Broadband Competition

The Large Incumbent LEC Commenters seriously overstate the extent of competition in the broadband market, principally by distorting both geographic, customer, and product markets within the broadband sector. First, Large Incumbent LEC Commenter claims to the contrary notwithstanding, the mere existence of cable modem service in certain markets does not render the broadband market fully competitive. Moreover, it matters not what the relative national market shares of DSL and cable modem services are if the large majority of consumers have access to only one or the other service.

In the market served predominantly by the small to mid-size carriers that constitute ASCENT's rank and file -- *i.e.*, the small to mid-size business market -- cable modem service is rarely available as an alternative to DSL service. Cable television ("CATV") operators have never established a meaningful presence in the small business market, generally limiting deployment of CATV infrastructure to residential areas and providing CATV service to relatively few businesses. Accordingly, cable modem service is available to an extremely small percentage of the small business market. Indeed, of the "5.2 million high-speed lines in service using cable modem technology at the end of June 2001," "approximately 5.0 million" were "residential customers."[2]

[2] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 17 FCC Rcd. 2844, ¶¶ 30 - 31, 44 - 47 (February 6,

Cable modem service, hence, does not constitute an intermodal service alternative to the incumbent LECs' DSL service in the small business market segment.[3]

2002).

[3] Indeed, one analyst has predicted that DSL will outpace cable modem service in the business market by a margin of 40 to 1 over the next five years. Jacobs, Tod A., J.P. Morgan Securities Inc., Industry Analysis: Telcom Services 2001, A Comprehensive Long-Term Forecast of the U.S. Telecom Services Industry, p. 32 - 33 (November 2001).

Even in the market segment principally served by cable modem service – *i.e.*, the residential market – the majority of consumers who have access to broadband service have either cable modem service or DSL service available to them, but not both. A survey of residential Internet users undertaken by the U.S General Accounting Office found that while broadband services were available to a majority of such households, only a quarter of the households had access to both cable modem and DSL services.[4] Confirming these results, the Commission recently reported that more than 40 percent of the nation's zip codes are not served by multiple providers of advanced services.[5] Head-to-head competition in the residential mass market segment is thus surprisingly limited, leaving the large majority of existing and potential residential broadband subscribers with no choice among service providers. If the only way to secure an alternative service is to move, the alternative is obviously not a meaningful option.

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[4] United States General Accounting Office, "Telecommunications: Characteristics and Choices of Internet Users (Report to the Ranking Minority Member, Subcommittee on Telecommunications, Committee on Energy and Commerce, House of Representatives), pp. 17 - 19 (February 2001).

[5] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 17 FCC Rcd. 2844 at ¶ 29.

And even in the large business market segment, the Large Incumbent LEC Commenters inflate the extent of broadband competition. Initially, cable modem service is no more a factor in the large business market segment than it is in the small business market sector, for very much the same reasons. Neither do other intermodal or intramodal broadband service alternatives generally provide effective choices for large business consumers. As reported by the Ad Hoc Telecommunications Users Committee ("Ad Hoc Committee"), which is comprised of "among the largest and most technologically sophisticated users of telecommunications services in the country," its members "face no competitive alternatives to ILEC services to meet their broadband business services requirements in the overwhelming majority of their service locations."[6] Indeed, based on a survey of 30,000 locations, the Ad Hoc Committee found that for the overwhelming majority of locations whose capacity needs did not exceed four DS-1 circuits, "viable competitive alternatives to the incumbent LEC's data service were available at less than 10% of locations," and that the same held true for the majority of locations with greater capacity needs.[7]

All of these flaws are masked by the Incumbent LEC Commenters' cynical, but nonetheless transparent, distortion of broadband geographic, customer and product market definitions. It makes no sense to talk of national geographic markets when neither cable modem service nor DSL service is available on a ubiquitous basis. It makes no sense to define residential and small business users as a single customer group when the availability of cable modem service to residential and small business users differs so dramatically. And it makes no sense to consider

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6 Comments of Ad Hoc Telecommunications Users Committee at 14.

large business customers apart from their multiple, often small, satellite locations.

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[7] Id. at 14 - 15.

Nor can it be said that other forms of intermodal competition make up for the lack of meaningful competition for incumbent LEC broadband services. As noted above, large business users report a striking lack of available broadband service alternatives across all technologies. And for the residential and small business markets, wireless broadband services are simply not sufficiently available, and will not be sufficiently available for the foreseeable future, to constitute a meaningful competitive alternative. As reported by the Commission, only between 100,000 and 300,000 subscribers are collectively being served by all forms and all providers of terrestrial fixed wireless and satellite technologies, the latter still being "in the early stages of deployment."[8] Confirming this assessment, the GAO determined that less than one percent of Internet users access the Internet by means of wireless technology.[9]

The best source of potential broadband competition in the residential and small business market place should be competitive LECs and data LECs. In the face of obstructionist tactics by incumbent LECs, however, these entities have only been able to carve out seven percent market share,[10] a value that will likely decline with the demise of data LECs such as Rhythms NetConnections, Inc., NorthPoint Communications, Inc., DSL.Net Communications, LLC and Prism Communications Services, as well as numerous competitive LECs. And despite grandiose promises,

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8 Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 17 FCC Rcd. 2844 at ¶¶ 55 - 60.

9 United States General Accounting Office, "Telecommunications: Characteristics and Choices of Internet Users (Report to the Ranking Minority Member, Subcommittee on Telecommunications, Committee on Energy and Commerce, House of Representatives) at pp. 15 - 16.

10 Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 17 FCC Rcd. 2844 at ¶ 51.

the Bell Operating Companies ("BOCs") have shown no real interest in entering one another's markets as broadband competitors.[11]

[11] *See, e.g.,* Letter from Gordon R. Evans, Vice President, Federal Regulatory, Verizon, to Carol Mattey, Deputy Chief, Common Carrier Bureau, Federal Communications Commission, submitted Mach 7, 2002 in CC Docket No. 98-184.

2. The Large Incumbent LEC Commenters Wrongfully Seek to Divorce Determination of the Regulatory Constraints to be Imposed on Their Provision of Broadband Services from Their Dominance in the Local Exchange/Exchange Access Market

In its comments, ASCENT emphasized that determination of what regulatory constraints must be imposed on incumbent LEC provision of broadband services cannot be undertaken without consideration of the incumbent LECs' continued dominance in the local exchange/exchange access market. The Large Incumbent LEC Commenters seek to divorce their control of bottleneck exchange facilities from the broadband regulation to which they will be subject, arguing that their market power in the provision of local exchange/exchange access services cannot be leveraged to disadvantage competitive providers of broadband services. The Large Incumbent LEC Commenters miss the point.

As ASCENT pointed out, incumbent LECs retain a share of the local exchange/exchange access market in excess of ninety percent.[12] They control the network facilities necessary to provide connectivity with a far greater percentage of customers. Hence the dominance of incumbent LECs in the local exchange/exchange access market cannot be disputed. This dominance cannot be ignored in determining the regulatory constraints that must be imposed on incumbent LEC provision of broadband services both because the same physical plant is used to provided customer connectivity for both traditional voice and broadband services and the provision

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[12] Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Local Telephone Competition: Status as of June 30, 2001, pg. 1 (February 2002).

of the two services is inextricably tied in the marketplace.

As ASCENT emphasized in its comments, DSL service is a competitively necessary offering for entities challenging incumbent LECs in the local exchange/exchange access market. Competitors, as the Commission has long recognized, must be able to provide all the services provided by incumbent LECs at a comparable level of quality if they are to mount an effective competitive challenge,[13] and given that broadband services are "assuming an increasingly critical role in our economy and our everyday lives,"[14] a competitor's ability to include DSL service among the suite of products it offers its residential and small business customers is essential to its competitive

viability.[15] As one analyst described the matter, "[a] carrier's success will ultimately be determined by its ability to deliver local, long distance, and Internet access over the same pipe."[16] Confirming

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[13] Application of BellSouth Corporation, *et al.* Pursuant to Section 271of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina (Memorandum Opinion and Order), 13 FCC Rcd. 539, ¶ 82 (1997) (*subsequent history omitted*).

[14] NPRM, FCC 01-360 at ¶ 4.

[15] Deployment of Wireline Services Offering Advanced Telecommunications Capability (Third Report and Order), 14 FCC Rcd. 20912, ¶ 5 (1999) (*subsequent history omitted*).

[16] Goldman Sachs, "The Race to Build the Broadband Kingdom," p. 26 (August 12, 1999).

this assessment are the persistent efforts of incumbent LECs to tie their provision of DSL service to their voice services.[17]

[17] Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Service in Connecticut (Memorandum Opinion and Order), 16 FCC Rcd. 14147, ¶¶ 28 - 33 (2001).

Enhancing the need to consider the incumbent LECs' continued control of "bottleneck" facilities necessary to provide connectivity to the residential and small business markets is the ability such control provides the incumbent LECs to disadvantage competitive providers of broadband services. As the Commission has recognized, incumbent LECs have the incentive and ability to utilize their control of bottleneck facilities "to discriminate against competitors in the provision of advanced services,"[18] not only to thwart competition in the provision of DSL services, but to limit competition in the provision of traditional voice services. One need only look to the carnage among the DLECs to understand the import of the continued incumbent LECs' control of the "last mile" to the competitive provision of broadband services. And the seemingly never ending list of fines assessed on incumbent LECs for failing to meet service commitments to competitive providers confirms the incumbent LECs' ability and incentive to disadvantage such entities in their provision of competitive broadband service offerings.[19]

3. The Large Incumbent LEC Commenters Erroneously Assume That Limited Broadband Competition Will Satisfy the Congressional Objective Of Fostering a Vibrant Local Telecommunications Market

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18 Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Controlling Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules (Memorandum Opinion and Order) 14 FCC Rcd. 14712, ¶ 186 (1999) (*subsequent history omitted*).

19 "Bell Fine Watch" available at www.voicesforchoices.com.

When Congress enacted the Telecommunications Act of 1996, it articulated a vision of a fully competitive, dynamic telecommunications marketplace populated by multiple service providers utilizing as a full range of technologies. It prescribed three different vehicles for local market entry to ensure broad market participation, recognizing that one or another might better facilitate entry by large, medium and small providers.[20] The Large Incumbent LEC Commenters would have the Commission substitute for this vibrant Congressional vision a duopoly broadband services market and a monopoly local exchange/exchange access market.

The Large Incumbent LECs urge the Commission to accept as sufficiently competitive a broadband services market in which residential and small business consumers may select between a single provider of each of DSL service and cable modem service. Unfortunately, duopolies seldom produce meaningful competitive environments. As the Commission's experience with the wireless markets demonstrates, two providers produce marginal price and service competition, while multiple providers tend to produce explosive competition of all sorts. When the cellular market was populated by two providers, markets were divided into roughly equal, and most

[20] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶¶ 10 - 15 (1996) (*subsequent history omitted*).

critically, consistent over time, shares,[21] while with the market entry of multiple PCS providers, the market rapidly evolved into a competitive battleground.[22]

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[21] Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (First Report), 10 FCC Rcd. 8844, ¶¶ 4, 13 - 28 (1995) ("The duopoly nature of cellular service made it less than fully competitive, however.").

[22] Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (Third Report), 13 FCC Rcd. 19746, pp. 2 - 4, 14 - 20 (1998) ("[T]he mobile telephone market experienced a number of service launches by broadband Personal Communications Services . . . and digital Specialized Mobile Radio . . . operators. Consequently, substantial progress has been made towards a truly competitive mobile telephone marketplace. . . . It appears from the data available that prices have been falling as competition has increased."); Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (Fourth Report), 14 FCC Rcd. 10151, pp. 10148 - 51, 10162 - 67 (1999) ("[O]perators have added significantly to the levels of competition in BTAs where other new entrants already were in service . . . The entrance of new competitors into this market is continuing to reduce prices"); Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (Fifth Report), 15 FCC Rcd. 17660, p. 17663 (2000) ("[T]he CMRS industry continues to benefit from the effects of increased competition as

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evidenced by lower prices to consumers and increased diversity of service offerings"); Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (Sixth Report), 16 FCC Rcd. 13350, pp. 13353 - 54 (2001) ("[T]he CMRS industry continued to experience increased competition and innovation as evidenced by lower prices for consumers and increased diversity of service offerings.").

In the broadband services market, it took the advent of cable modem service to force incumbent LECs to take DSL service off the shelf,[23] and it took the emergence of the data LECs to compel price competition for not only DSL, but cable modem service. Once the data LECs had been thwarted, prices for DSL service began to rise[24] and advanced services facilities deployment (where not required to meet cable modem competition) slowed.[25] And not unremarkably, prices for cable modem service have risen as DSL rates have increased.[26] In short, classic duopoly behavior by the incumbent LECs and providers of cable modem service occurred.

4. The Large Incumbent LEC Commenters Fail to Substantiate Their Claim That Dominant Carrier Regulation of Their Provision of Broadband Services Has Dampened Deployment Of Broadband Capability

As the Commission has repeatedly found, advanced services capability is being

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[23] Economic Report of the President Transmitted to the Congress Together with the Annual Report of the Counsel of Economic Advisors, pp. 187- 88 (U.S. Government Printing Office February 1999) ("Although DSL technology has been available since the 1980s, only recently did local telephone companies begin to offer DSL service to businesses and consumers seeking low-cost options for high-speed telecommunications. The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from cable television networks delivering similar high-speed services, and the enty of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities.").

[24] Garcia, Beatrice E., "Broadband Providers Seem to Pay Price for Overly Optimistic Projections," The Miami Herald (December 13, 2001); Kelsey, Dick, "Broadband Prices Up in 2001 - Study," Post-Newsweek Business Information, Inc. (January 18, 2002).

[25] Ulfeder, Steve, "The DLECs' Demise; Upstart DSL Providers Claim Dirty Tricks by Incumbents Contributed to Their Downfall; End Result is that Customers Might Be Paying More and Waiting Longer for Broadband," Network World (January 7, 2002); IDC, US DSL Market Shares by Vendor (August 2001) ("The ILECs now dominate the US DSL market, and with a dearth of competition, the ILECs no longer have an incentive to aggressively . . . deploy DSL service.").

[26] "Basic Broadband Prices Rose Last Year, Study Shows," Communications Today (January 22, 2002); Garcia, Beatrice E., "Broadband Providers Seem to Pay Price for Overly Optimistic Projections," The Miami Herald (December 13, 2001).

deployed in a reasonable and timely manner.[27] The Large Incumbent LEC Commenters nonetheless claim that dominant carrier regulation is hindering the deployment of such facilities. The problem, however, is not a lack of facilities deployment, it is a lack of the competitive provision of advanced services.

[27] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 17 FCC Rcd. 2844 at ¶ 1.

As recently reported by the Commission, "97 percent of the country's population lives in those zip codes where high-speed subscribership was reported."[28] ADSL service, as to which incumbent LECs possess a 97 percent market share, "is now available to about 45 percent of U.S. homes, compared to 25 percent of homes at the end of 1999" – an increase of 80 percent in roughly 18 months.[29] "Incumbent LECs have increased the number of customers who now have the opportunity to obtain DSL from 44 percent in 1999 . . . to an estimated 64 percent in 2001."[30] And "[w]hile widespread deployment of DSL began later relative to deployment of cable modem service, overall deployment of DSL is catching up."[31] This is because "a substantial portion" of the $29.4 billion incumbent LECs invested in infrastructure in 2000 was "in high-speed or advanced data

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[28] Id. at ¶ 28.

[29] Id. at ¶ 51.

[30] Id. at ¶ 70.

[31] Id. at ¶ 68.

services."[32]

Nor are the Large Incumbent LEC Commenters in a position to dispute these Commission's finding. Verizon, for example, has recently proclaimed in various press releases (issued January 31, 2002 and April 23, 2002) that it is now serving 1.35 million access lines -- a year-to-year increase of 88 percent -- and has deployed DSL to central offices serving 79 percent of its access lines. And, not to be outdone, BellSouth has asserted in press releases (issued January 3, 2002 and April 19, 2002) that its most recent twelve month growth rate for DSL service was 141 percent and that it had "deploy[ed] DSL in more than 8,600 remote terminals, more than any other DSL provider in the industry," positioning itself for "eas[y] implemt[ation of] next generation services."

In short, incumbent LECs are, and have been, upgrading their network facilities to accommodate advanced services. And, if anything, such investment is, and has been, driven by the

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[32] Id. at ¶ 69.

current regulatory infrastructure. As the Commission has acknowledged, "DSL deployment began in response to the 1996 Act and the presence of competitive access providers."[33]

Notably, the Large Incumbent LEC Commenters do not, and could not, detail how it is that dominant carrier regulation impedes deployment of advanced services capability. The costs imposed on the Large Incumbent LEC Commenters by such regulation are far from substantial, so it could not be that the regulation diverts investment capital. And such regulation has not deterred incumbent LECs from investing billions to deploy advanced services capability over the past five years. Nor has dominant carrier regulation prevented incumbent LECs from corralling 93 percent of the DSL market or increasing the number of ADSL customers from 0.4 million at year-end 1999 to 2.7 million by June 30, 2001.[34] The only thing that will deter incumbent LEC infrastructure in advanced services capability is an absence of a competitive threat, which could occur, particularly

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[33] Id. at ¶ 68.

[34] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 17 FCC Rcd. 2844 at ¶¶ 49, 51. The number of DSL lines continues to grow at a dramatic rate to 3.6 million at year-end 2001. Kelsey, Dick, "Broadband Prices Up in 2001 - Study," Post-Newsweek Business Information, Inc. (January 18, 2002).

in the small business market, if the Commission relaxes regulatory oversight prematurely.

5. Conclusion.

By reason of the foregoing, the Association of Communications Enterprises hereby once again urges the Commission to refrain from relaxing the regulatory constraints now imposed on incumbent LEC provision of DSL service and to retain existing regulatory oversight of such services until Section 251(c) has been fully implemented.

Respectfully submitted,

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